Supreme Court, U.S.
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No. 04 558

IN THE

Supreme Court of the United States

Todor Krumov Simeonov

Petitioner

v.

John Ashcroft, Attorney General

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Todor Krumov Simeonov
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QUESTION PRESENTED

The question presented for review in this case is the decision made by the Board of Immigration Appeals (BIA) and later confirmed by United States Court of Appeals for the Ninth Circuit to dismiss an appeal based on Nicaraguan Adjustment and Central American Relief Act ("NACARA") of 1997. The Ninth Circuit Court dismissed the appeal solely based on the argument that the applicant was placed in exclusion proceedings when he entered United States in 1990 and therefore was ineligible for suspension of deportation.

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Statutes:

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- INA Section 244(a)
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- IIRIRA Section 309(c)

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Nicaraguan Adjustment and Central American Relief Act ("NACARA") Pub. L. 105-100

- NACARA Section 203

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Federal Courts:

- The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 371 F.3d 532.
- The decision of the Board of Immigration Appeals appears at Appendix B to the petition.

JURISDICTION

Federal courts:

- The date on which the United States Court of Appeals decided my case was May 27, 2004.

- No petition for rehearing was timely filed in my case.

- The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Immigration and Nationality Act:

Section 244. 1/ [8 U.S.C. 1254]

(a) Granting of Status.-

(1) In general.- In the case of an alien who is a national of a foreign state designated under subsection (b) (or in the case of an alien having no nationality, is a person who last habitually resided in such designated state) and who meets the requirements of subsection (c), the Attorney General, in accordance with this section-

(A) may grant the alien temporary protected status in the United States and shall not remove the alien from the United States during the period in which such status is in effect, and

(B) shall authorize the alien to engage in employment in the United States and provide the alien with an "employment authorized" endorsement or other appropriate work permit.

Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA) Section 203:

Section 203(f) (A) the alien-

(i) is not inadmissible or deportable under paragraph (2) or (3) of section 212(a) or paragraph (2), (3), or (4) of section 237(a) of the Immigration and Nationality Act and is not an alien described in section 241(b)(3)(B)(i) of such Act;

(ii) has been physically present in the United States for a continuous period of not less than 7 years immediately preceding the date of such application;

(iii) has been a person of good moral character during such period; and

(iv) establishes that removal would result in extreme hardship to the alien or to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

Interpretation of NACARA Section 203 found in the United States Citizenship and Immigration Services web page:

"Section 203 of NACARA allows qualified individuals to apply for suspension of deportation or for cancellation of removal ("NACARA 203 relief") under the standards similar to those in effect before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. At the same time an individual is granted NACARA 203 relief, he or she is also given lawful permanent resident status."

Code of Federal Regulations:

8 C.F.R. Section 240.61

(3) An alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and, at the time of filing the application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia;

STATEMENT OF THE CASE

I am of Bulgarian nationality, who arrived in United States on August 6, 1990 at the age of 24. The place of entry was at Miami International Airport. Immediately after arriving at the airport I reported to the Immigration officer and informed him that I would like to apply for asylum in the United States. After being held at the airport for a week I was able to fill an application for asylum on August 13, 1990 with the help of a Russian interpreter. One-day later the Immigration and Naturalization Service (INS) responded by denying the request for asylum. As a result the Immigration officer gave me the option either to return back to Bulgaria or present my case in front of Immigration Judge. I chose the second option.

I was detained in Crome Detention Center (located south of Miami) for more than three months. On November 27, 1990 I was released under parole with the help of Church World Service - coordinator of refugee programs in Miami. After I was released I began to work and was able to hire the legal service at the church of Apostolic Mission of Christ. The legal service at the church prepared the brief, which was later filed to the INS. The case was heard on October 29, 1991 in Miami Immigration Court. The presiding Judge Keith C. Williams denied the application for asylum. At the hearing I was presented by attorney Carlos Bigles. I need to clarify that the case was prepared at the legal office of the church of Apostolic Mission of Christ where I paid the fee. Mr. Carlos Bigles, who has his own independent law practice was the attorney representing me only at the hearing and was hired by the Apostolic Mission of Christ church. After Judge Williams' decision was announced, Mr. Bigles prepared the appeal to the Board of Immigration Appeals (BIA) on my behalf, which I signed as a pro se without being aware of it. Later on I spoke with Mr. Bigles several times asking him if any additional paper work needed to be filed. He assured me that everything has been filed already.

On March 25, 1992 the Board of Immigration Appeals denied the appeal, informing me that "no separate written brief of statement has been received from the applicant." I did call Mr. Bigles for explanation on the Board decision, but he only informed me that he no longer represents me. I went to the office at the church of Apostolic Mission of Christ, but they told me that it was too late and they could not do anything regarding my case.

A few weeks later I received a letter from INS ordering me to report at the Immigration building on May 28, 1992 ready to be deported. Not knowing what to do I went back to Church World Service, where Mr. L. Donavan Brautigam a paralegal assistant helped me file pro se a Motion to reopen the case. The Motion to reopen the case was filed on May 22 at the BIA. The paralegal service also advised me not to report for the scheduled deportation. I followed their advice.

On August 13, 1992 the BIA denied the Motion to reopen the case. After the dismissal of the Motion to reopen I expected a second deportation order, which did not arrive. I also did not attempt to contact INS, being afraid that I might be deported. Despite the dismissal of the Motion, I continued to seek ways to reinstate the case. I met with a number of immigration attorneys and other refugee organizations. I still have records for some of these meetings. My efforts to reinstate the case continued to be unsuccessful all the way until 1997, when the United States Congress passed the NACARA act. By that time I had already relocated in Seattle, Washington. I also need to clarify that during that time I continued to work, and filed tax return documents as I have been doing it since 1991. When I filed the tax returns I stated my current addresses and phone numbers.

On September 9, 1998 attorney Daniel Hoyt Smith filed a Motion to reopen the case on my behalf. On November 11, 1998 Immigration Judge, Keith C. Williams granted the Motion to reopen and Change of venue to Seattle. There was no reply in Opposition to the Judge's

decision from INS. Later on Immigration Judge Anna Ho in Seattle scheduled a court hearing for July 22, 1999. At the hearing Judge Anna Ho denied the request for Suspension of Deportation. The Judge found the requisites of continuous physical presence and good moral character to be satisfied; however the burden of proof with regard to "extreme hardship" were not met.

Although Mr. Daniel Hoyt Smith did excellent job in preparing and presenting the case I could no longer afford his services. Attorney Barbara Marcouiller filed the appeal to the BIA. On May 2, 2002 the BIA dismissed the appeal. The argument of the BIA was that "since the applicant is in exclusion proceedings he is not statutorily eligible for suspension of deportation."

Another appeal to the United States Court of Appeals for the Ninth Circuit followed, this time filed by attorney Michael Johnson-Ortiz. After filing the appeal a second deportation order was issued by INS scheduled for July 10, 2002. On the appointed date I appeared with request of order for supervision. Knowing that such an order can be granted only under the discretion of the Attorney General, I was prepared for deportation. The Immigration officer, however, accepted the request and permitted me to remain in the country until the completion of the case.

Several weeks before the scheduled oral argument in front of the Ninth Circuit Court I received a letter from Washington State Bar Association informing that my attorney Mr. Johnson-Ortiz has left the country and abandoned his law firm. Not being able to hire another attorney I contacted the Office of the Clerk for the Ninth Circuit Court and asked if I could appear at the oral argument without an attorney. I was told that the Court could make a decision based on the brief alone already filed earlier by Mr. Johnson-Ortiz. I did appear at the Ninth Circuit Court on March 29, 2004 prepared to answer any questions the Court might have had for me. The Ninth Circuit Court was in a panel of Judge William C. Candy, Jr., Judge Kim McLane

Wardlaw and Judge Ronald M. Gould. Only in a matter of a few minutes the Court explained to me that as a matter of Law the BIA has not erred in its decision, and that the Ninth Circuit Court can not overturn the decision. Not being able to argue with the Court, since Mr. Johnson-Ortiz had filed the brief and I did not fully understand his legal arguments, I agreed with the Judges. On May 27, 2004 the United States Court of Appeals for the Ninth Circuit denied the pettion for review of the case. "The court held that regardless of Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), an alien in exclusion proceedings is ineligible for suspension of deportation." Judge Wardlaw wrote the Court Opinion.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court has reached its decision based on the rules established in IIRIRA Section 309(c) and INA Section 244(a). Further, as additional evidence the Court cites three previously decided cases: [Leng May Ma v. Barber, 357 U.S. 185, 189-90 (1958); Patel v. McElroy, 143 F.3d 56, 60 (2d Cir. 1998); Yuen Sang Low v. Att'y Gen. of the United States, 479 F.2d 820-23 (9th Cir. 1973)].

IIRIRA Section 309(c) and INA Section 244(a) and the three earlier mentioned cases provide grounds for an argument; however, first the BIA and then the Ninth Circuit Court chose to completely ignore a number of provisions and waivers added after the enactment of IIRIRA in 1996. Some of the transitional rules found in IIRIRA 309(c) are generally applicable, unless otherwise noted. With the enactment of NACARA a number of provisions were made available for specific groups of aliens, including myself found in 8 C.F.R. Section 240.61(3). These provisions found in NACARA Section 203 provide relief for immigrants from some ex-communist countries, including Bulgaria, who have entered United States no later than December 31, 1990, and have filed an application for asylum no later than December 31,

1991. Additional rules giving the opportunity for aliens placed in exclusion proceedings to apply for re-adjustment of status and suspension deportation are found in INA Section 244(a)(1). All these provisions have been already recognized and confirmed by two Immigration Judges.

First, Judge Keith C. Williams from Miami granted the Motion to reopen the case in 1998 as a "timely and reasonable request," despite the fact that on his order it is clearly stated that the case is "In Exclusion Proceedings." It is important to note that Judge Keith C. Williams was the same Judge who denied the asylum application seven years earlier, meaning that he is well familiar with the case and the issues involved in it.

Second, Judge Ana Ho from Seattle stated in her written decision filed on August 2, 1999: "Since the Applicant is prima facie eligible for this special NACARA Suspension, the Court allowed the Applicant to go forward with his application." Further, the Judge states:

> "Section 244(a)(1) of the Act provides that the Attorney General may through an Immigration Judge, in her discretion, "suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence" in the case of an alien who applies for such relief and is excludable under any law of the United States except the provision stated in Section 244(a)(2)."

The conclusion on the matter of eligibility for suspension of deportation reached by the two Immigration Judges clearly conflicts with the consequent decisions announced by the BIA and the Ninth Circuit Court. It shows that the different courts have different interpretations of the laws when it comes to a central issue in this case such as elegibility for suspension of deportation. Such inconsistencies have been common throughout the history of this case, beginning with the very first application for asylum filed in 1990. When I arrived in the United States I had no knowledge of the local Immigration customs and laws. I

relied entirely on the Immigration authorities for guidance and assistance in the process. INA Section 237(a)(1) states that "any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported." Accordingly, as I was placed in exclusion proceedings I should have been deported immediately. Instead I was placed in lengthy legal process, which needed twelve years for the BIA and fourteen for the Ninth Circuit Court to reach the same conclusion. In the mean time, while reaching their conclusions the Ninth Circuit Court and the BIA have chosen to disregard the changes that have taken place in Immigration law during this period of time.

All these findings, including the fact that the issue of eligibility for suspension of deportation was not raised either by the Immigration officer who gave me the option to choose to present my case in front of Immigration Judge in 1990, nor by Judge Keith C. Williams at the first hearing in 1991, provide enough evidence for the Supreme Court to consider the case for review. Further, I hope that the court will find me eligible for such relief and also grant me the application for suspension of deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 10/30/2004

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Todor Krumov Simeonov,

Petitioner,

v.

John Ashcroft, Attorney General,*

Respondent.

No. 02-71545
Agency No. A29-355-460
OPINION

On Petition for Review of an Order of the Board of Immigration Appeals

Argued and Submitted
March 29, 2004-Seattle, Washington

Filed May 27, 2004

Before: William C. Candy, Jr., Kim McLane Wardlaw and Ronald M. Gould, Circuit Judges.

Opinion by Judge Wardlaw

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*John Ashcroft, Attorney General, is substituted for the Immigration and Naturalization Service ("INS") as the proper respondent. Fed. R. App. P. 43(c)(2). The INS ceased to exist on March 1, 2003.

SUMMARY

Immigration/Removal and Asylum

The court of appeals denied a petition for review. The court held that regardless of Section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA), an alien in exclusion proceedings is ineligible for suspension of deportation.

After arriving in Miami in 1990 with no documentation seeking admission to the United States, petitioner Todor Simeonov, a native and citizen of Bulgaria was placed in exclusion proceedings, and paroled into the United States pending resolution of those proceedings. The Miami immigration judge (IJ) denied his requests for asylum and withholding of deportation, and in 1991 ordered him excluded and deported. The Board of Immigration Appeals (BIA) affirmed and denied Simeonov's subsequent motion to reopen to reopen in 1992. However, the INS did not enforce the exclusion order and Simeonov remained in the United States, moving to Seattle, Washington. In 1997, Congress passed NACARA, which amended the Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) transitional rules so that qualified aliens from Bulgaria and other countries could obtain suspension of deportation under more lenient rules than IIRIRA's standard for cancellation of removal. In 1998, Simeonov successfully moved to reopen his case to apply for relief under NACARA and to change venue to Seattle, after which Simeonov applied for suspension of deportation pursuant to NACARA Section 203. Because he was in exclusion proceedings before IIRIRA took effect on April 1, 1997, Immigration and Naturalization Act (INA) Section 244(a) governed Simeonov's application for suspension of deportation. After a merits hearing, the IJ denied Simeonov's application for

failure to establish extreme hardship to himself. The BIA dismissed Simeonov's appeal solely on the ground that Simeonov was statutorily ineligible for suspension of deportation because he was an alien in exclusion proceedings.

Simeonov petitioned for review.

[1] Compared to the more lenient requirements for suspension of deportation under INA Section 244, IIRIRA's cancellation of removal provision raised the bar to relief. Section 240A increased the number of years required to establish continuous presence in the United States from seven to 10 years, heightened the standard for demonstrating hardship, and created a new "stop-time" rule. The new stop-time rule (1) deems the alien's period of continuous presence to end when he is served with a notice to appear or commits certain offenses, and (2) treats a departure from the United States for a period in excess of 90 days (or periods in the aggregate exceeding 180 days) as a failure to maintain continuous presence.

[2] Application of IIRIRA's new rules to aliens already in exclusion or deportation proceedings as of April 1, 1997 is governed by the transitional rules of IIRIRA Section309(c). NACARA Section 203 emended these transitional rules to permit qualified aliens from certain countries placed in proceedings before, on, or after April 1, 1997, to apply for "special rule" protection from deportation pursuant to IIRIRA Section 309(c)(5)(C). Specifically, for purposes of calculating the qualified alien's period of continuous physical presence, NACARA exempts the alien from application of IIRIRA's stop-time rule regardless of whether the alien is in exclusion or deportation proceedings before April 1, 1997.

[3] IIRIRA and the transitional rules were inapplicable to Simeonov because his exclusion order became final years before IIRIRA's effective date of April 1, 1997. Thus, if Simeonov was entitled to apply for suspension of deportation at all, his application would be governed by the more generous pre-IIRIRA standard of INA Section 244(a) in any event. In other words, the only procedural relief that NACARA provided was relief that Simeonov does not need.

[4] Under the pre-IIRIRA statutory scheme, an alien such as Simeonov, who arrived at the border seeking admission and was deemed ineligible for entry and ordered excluded, could be placed in exclusion proceedings and paroled into the United States pending completion of his proceedings. That parole, however, shall not be regarded as an admission of the alien, and thus is not a lawful entry of the alien into United States. Accordingly, that paroled alien is ineligible for the discretionary relief of withholding or suspension of deportation. [5] NACARA did not undermine this. The purpose of NACARA is not to alter the legal landscape by creating a remedy of suspension of deportation for persons paroled into the United States and subject to a final order of deportation. Rather, NACARA's purpose is to grant procedural relief to qualified aliens, allowing them to begin anew their ongoing proceedings without being subject to IIRIRA's stop-time rule.

[6] This conclusion was not inconsistent with the language "regardless of whether the alien is in exclusion or deportation proceedings," found at IIRIRA Section 309(c)(5)(C)(i), as amended by NACARA Section 203. For example, that language would apply to an alien whose excluion proceedings were not final prior to April 1, 1997, and for whom the Attorney General had chosen to begin asylum proceedings anew. It would also apply to an alien previously erroneously placed in exclusion proceedings and

then properly placed in deportation proceedings (before April 1, 1997) or removal proceedings (after that date). In each of these examples, NACARA would exempt the qualified alien in ongoing proceedings from IIRIRA's stop-time rule by counting the time spent in exclusion proceedings for purposes of calculating his period of physical presence in the United States. **[7]** Thus, even if Simeonov were to satisfy the requirements of NACARA Section 203, he was nevertheless ineligible for suspension of deportation because he never legally entered the United States and was subject to a final order of deportation. It had to be found the BIA's determination that Simeonov was ineligible for suspension of deportation was supported by the plain and sensible meaning of IIRIRA Section 309(c) and INA Section 244(a).

[8] Under 8 C.F.R. Section 240.31, an IJ has the power and authority to adjudicate a NACARA claim subject to any specific limitation prescribed by statute. The IJ did adjudicate Simeonov's NACARA claim, and found against him. Because the BIA may dismiss summarily an appeal that fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation, the BIA's dismissal was not in error.

[9] The BIA has authority to conduct a *de novo* review of the record and issue its own decision. **[10]** The BIA's *sua sponte* analysis of Simeonov's statutory eligibility for suspension of deportation and its failure to reach the merits of his claim did not violate his due process rights. Simeonov's petition had to be denied.

COUNSEL

Petitioner Todor Krumov Simeonov, Seattle, Washington, *in pro se*.

M. Jocelyn Lopez Wright, Andrew C. MacLachlan, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, DC, for the respondent.

OPINION

WARDLAW, Circuit Judge:

Todor Krumov Simeonov, a native and citizen of Bulgaria, petitions for review of the Board of Immigration Appeals' (BIA's") final order dismissing his appeal from the Immigration Judge's ("IJ's") decision denying his request for suspension of deportation pursuant to Section 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997, Title II of Pub. L. No. 105-100, 111 Stat. 2160, as amended by Pub. L. No. 105-139, 111 Stat. 2644 ("NACARA"). We have jurisdiction under former 8 U.S.C. Section 1105a, and Section 309(c) of the transitional rules set forth in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), as amended by the Act of October 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656 ("IIRIRA"), and we deny the petition.

I

The facts are undisputed. On August 6, 1990, Simeonov arrived at Miami International Airport with no

documentation, seeking admission to the United States.[1] The INS denied his admission, placed him in exclusion proceedings, and paroled him into the United States pending resolution of those proceedings. The Miami IJ denied his requests for asylum and withholding of deportation, and on October 19, 1991 ordered him excluded and deported. The BIA affirmed the order and denied Simeonov subsequent motion to reopen on August 13, 1992. Nevertheless, as the government candidly admits, "for reasons that are not clear from the record, the INS did not enforce the exclusion order and Mr. Simeonov remained in the United States, moving to Seattle, Washington, working, and going to school."

On November 19, 1997 Congress passed NACARA, which amended IIRIRA's transitional rules so that qualified aliens from Bulgaria (and other former Soviet Bloc countries) could obtain suspension of deportation under more lenient rules than IIRIRA's standard for cancellation of removal. *See* IIRIRA Section 309(c)(5). On September 11, 1998, Simeonov successfully moved to reopen his case to apply for relief under NACARA and to change venue to Seattle, Washington. Thereafter, on June 11, 1999, Simeonov applied for suspension of deportation pursuant to NACARA Section 203. Because he was in exclusion proceedings before IIRIRA took effect on April 1, 1997, Immigration and Naturalization Act ("INA") Section 244(a) governed Simeonov's application for suspension of

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[1] Simeonov explained at argument that his original plan was to apply for asylum in Canada on a layover en route from Mexico City to Madrid. Only after his flight was twice delayed, and the layover in Canada was cancelled, did Simeonov decide to fly to Miami to seek asylum there.

Simeonov appeared before us pro se because his attorney, after filing Simeonov's brief, abruptly left the United States and later informed the Immigration Court that he did not intend to return and that he no longer represented his clients.

deportation. *See* IIRIRA Section 309(c)(1)-(3). Thus, Simeonov argued under pre-IIRIRA criteria that he had been in the United States for the requisite seven years, was of a good moral character, and that deportation to Bulgaria would cause him extreme hardship. After a merits hearing, the IJ issued a written decision denying Simeonov's application for failure to establish extreme hardship to himself. Simeonov appealed to the BIA, challenging the IJ's hardship determination.

On May 2, 2002, the BIA, relying on *In re Torres*, 19 I. & N. Dec. 371, 372-373 (BIA 1986), issued a *per curiam* order, in which it concluded that Simeonov is statutorily ineligible for suspension of deportation because he is an alien in exclusion proceedings. The BIA dismissed Simeonov's appeal solely on that ground; it did not reach the merits of his claim. Simeonov timely filed a petition for review of the BIA's order.

II

Where, as here, the BIA conducts a *de novo* review and issues its own decision, rather than adopting the IJ's decision as its own, we review the BIA's decision. *See Kankamalage v. INS*, 335 F.3d 858, 861 (9th Cir. 2003). We review *de novo* the BIA's determination of purely legal questions regarding the Immigration and Nationality Act, giving deference to the BIA's interpretation unless that interpretation is contrary to the plain and sensible meaning of the statute. *See id.* at 861-62 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). We review *de novo* claims of due process violations in immigration proceedings. *See Padilla v. Ashcroft*, 334 F. 3d 921, 923 (9th Cir. 2003).

III

A

[1] Among other things, IIRIRA eliminated the distinction between "exclusion" and "deportation" proceedings, repealed INA Section 244 and the discretionary relief of suspension of deportation, and established a new form of discretionary relief called "cancellation of removal." INA Section 240A, 8 U.S.C. Section 1229b. Compared to the more lenient requirements for suspension of deportation under INA Section 244, IIRIRA's cancellation of removal provision raised the bar to relief. Section 240A increased the number of years required to establish "continuous presence" in the United States from seven to ten years, heightened the standard for demonstrating hardship, and created a new "stop-time" rule. 8 U.S.C. Section 1229(b), (d). The new stop-time rule (1) deems the alien's period of continuous presence to end when he is served with a notice to appear or commits certain offenses, *id.* Section 1229(d)(1), and (2) treats a departure from the United States for a period in excess of 90 days (or periods in the aggregate exceeding 180 days) as a failure to maintain continuous presence, *id.* Section 1229(d)(2).

[2] Application of IIRIRA's new rules to aliens already in exclusion or deportation proceedings as of April 1, 1997 is governed by the transitional rules of IIRIRA Section 309(c). *See Marquez v INS*, 346 F.3d 892, 900 (9th Cir. 2003) (citing *INS v. St. Cyr*, 533 U.S. 289, 318 (2001)). NACARA Section 203 amended these transitional rules to permit qualified aliens from certain countries placed in proceedings before, on, or after April 1, 1997, to apply for "special rule" protection from deportation pursuant to IIRIRA Section 309(c)(5)(C). This "special rule" relief provides "the more generous pre-IIRIRA suspension of deportation remedy." *Munoz v. Ashcroft*, 339 F.3d 950, 955 (9th Cir. 2003).

Specifically "for purposes of calculating the [qualified alien's] period of continuous physical presence," NACARA exempts the alien from application of IIRIRA's stop-time rule "regardless of whether the alien is in exclusion or deportation proceedings before [April 1, 1997]." IIRIRA Section 309(c)(5)(C)(I), as amended by NACARA Section 203.

[3] Focusing upon this language, Simeonov argues that NACARA Section 203 allows him to apply for pre-IIRIRA suspension of deportation despite his final order of deportation entered well before April 1, 1997, and that the BIA therefore erred in refusing to address the merits of his application. One fundamental problem with this argument is that IIRIRA and the transitional rules are inapplicable to Simeonov because his exclusion order became final years before IIRIRA's effective date of April 1, 1997. *See Marquez*, 346 F.3d at 900-01 (holding that the procedural aspects of IIRIRA Section 309(c) apply only to ongoing exclusion proceedings and are "irrelevant in cases involving aliens whose orders of deportation or exclusion were final of the effective date"). Thus, if Simeonov is entitled to apply for "suspension of deportation" at all, his application would be governed by the more generous pre-IIRIRA standard of INA Section 244(a) in any event - a point with which the government agrees. *Cf. Fieran v INS,* 268 F.3d 340, 345 (6th Cir. 2001) ("[NACARA's] purpose to impose pre-IIRIRA terms would be illogical here where pre-IIRIRA terms already govern."). In other words, the only procedural relief that NACARA provides is relief that Simeonov does not need.

Thus, what Simeonov actually seeks in this appeal is a ruling that NACARA entitles him as a *substantive* matter to apply for suspension of deportation even though he was placed in exclusion proceedings and has been under a final order of exclusion since 1992. This creates a second

fundamental problem for Simeonov's petition, to which we now turn.

B

The BIA ruled here that, regardless of NACARA, Simeonov is ineligible for suspension of deportation because he is an alien in exclusion proceedings. The relevant provisions of the INA and a long history of cases interpreting those provisions support this conclusion.

[4] Under the pre-IIRIRA statutory scheme, an alien such as Simeonov, who arrives at the border seeking admission and is deemed ineligible for entry and ordered excluded, may be placed in exclusion proceedings and paroled into the United States pending completion of his proceedings. That parole, however, "shall not be regarded as an admission of the alien," INA Section 212(d)(5)(A), 8 U.S.C. Section 1182(d)(5)(A), and thus is not a "lawful entry of the alien into the United States," INA Section 101(a)(13)(A), 8 U.S.C. Section 1101(a)(13)(A). Accordingly, that paroled alien is ineligible for the discretionary relief of withholding or suspension of deportation. *See Leng May Ma v. Barber*, 357 U.S. 185, 189-90 (1958) (alien ordered excluded and paroled not "legally within the United States" and thus ineligible for withholding of deportation under INA Section 243(h), 8 U.S.C. Section 1253 (h)); *Patel v McElroy*, 143 F.3d 56, 60 (2d Cir. 1998) (alien ordered excluded and paroled not lawfully admitted into the United States and thus ineligible for suspension of deportation under INA Section 244(a), 8 U.S.C. Section 1254(a)); *Yuen Sang Low v. Att'y Gen. of the United States*, 479 F.2d 820, 822-23 (9th Cir. 1973) (same).

[5] NACARA did not undermine these well-established precedents. The purpose of NACARA is not to alter the legal landscape by creating a remedy of suspension

of deportation for persons paroled into the United States and subject to a final order of deportation. Rather, NACARA's purpose is to grant procedural relief to qualified aliens, allowing them to begin anew their ongoing proceedings without being subject to IIRIRA's stop-time rule. *See Fieran*, 268 F.3d at 345-46; *Sherif v. INS*, 260 F.3d 737, 741-42 (7th Cir. 2001) ("Indeed, by its own terms, [NACARA Section 203] is limited to the purpose of calculating the period of continuous physical presence in the United States....Nothing in NACARA changed the well-established rule that aliens in exclusion proceedings are not entitled to suspension of deportation, ").

[6] This conclusion is not inconsistent with the language "regardless of whether the alien is in exclusion or deportation proceedings," found in IIRIRA Section 309(c)(5)(C)(i), as amended by NACARA Section 203. For example, that language would apply to an alien whose exclusion proceedings were not final prior to April 1, 1997, and for whom the Attorney General had chosen to begin asylum proceedings anew. It would also apply to an alien previously erroneously placed in exclusion proceedings and then properly placed in deportation proceedings (before April 1,1997) or removal proceedings (after that date).[2] In each of these examples, NACARA would exempt the qualified alien in ongoing proceedings from IIRIRA's stop-time rule by counting the time spent "in exclusion proceedings" for purposes of calculating his period of physical presence in the United States. *See Fieran*, 268 F.3d at 345-46; *Sherif*, 260 F.3d at 742.

[7] Thus, even if Simeonov were to satisfy the requirements of NACARA Section 203, he is nevertheless ineligible for suspension of deportation because he never legally entered the United States and is subject to a final

[2] Simeonov does not claim that he was improperly placed in exclusion proceedings.

order of deportation. In light of the plain language of IIRIRA Section (309)(c), as amended by NACARA, and legal precedent concluding that suspension of deportation is unavailable to aliens in exclusion proceedings, we find the BIA's determination that Simeonov is ineligible for suspension of deportation to be supported by the plain and sensible meaning of IIRIRA Section 309(c) and INA Section 244(a).

C

Simeonov also argues: (1) that 8 C.F.R. Section 240.31 required the BIA to reach the merits of his claim, and (2) that the BIA's failure to do so violated his due process rights.

[8] 8 C.F.R. Section 240.31 provides:

> In determining cases referred for further inquiry as provided in section 235 of the Act, immigration judges shall have the powers and authority conferred upon them by the Act and this chapter, including the adjudication of applications for adjustment of status pursuant to [NACARA]....Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General by the Act as is appropriate and necessary for the disposition of such cases.

Simeonov asserts that Section 240.31 "mandates the IJ to exercise the discretion and authority conferred for the adjudication of application for adjustment of applications for adjustment of status pursuant to [NACARA]," and the BIA therefore erred as a matter of law by finding him statutorily ineligible for relief. This misconstrues the plain language of

the regulation, which simply means than an IJ has the power and authority to adjudicate a NACARA claim subject to any specific limitation prescribed by statute. Here, the IJ did adjudicate Simeonov's NACARA claim, and found against him. Moreover, as discussed above, there are specific statutory limitations in this case; the only relief NACARA Section 203 affords is suspension of deportation under the more lenient standard of INA Section 244, which is unavailable to Simeonov in any event because he is subject to a final order of deportation. Because the BIA may dismiss summarily an appeal that "fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation," 8 C.F.R. Section 1003.1(d)(2)(i)(H), the BIA's dismissal was not in error.

[9] With respect to Simeonov's due process argument, it is well settled that the BIA has authority to conduct a *de novo* review of the record and issue its own decision. *See, e.g., Pal v. INS*, 204 F.3d 935, 939 (9th Cir. 2000). Here, the BIA cited *In re Torres*, 19 I. & N. Dec. 371, 372-73 (BIA 1986), and explicitly determined: "Since [Simeonov] is in exclusion proceedings, he is not statutorily eligible for suspension of deportation." Having made this threshold determination of law, it was unnecessary for the BIA to reach the merits of Simeonov's NACARA claim. *See INS v. Bagamasbad*, 429 U.S. 24,25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the result they reach.").

[10] "Thus, the BIA's *sua sponte* analysis of Simeonov's statutory eligibility for suspension of deportation and its failure to reach the merits of his claim did not violate his due process rights. Even if we were to find such a violation, Simeonov's claim nevertheless would fail because he suffered no prejudice: Assuming arguendo that Simeonov meets all of the requirements under NACARA Section 203

and INA Section 244(a), he is nevertheless ineligible for suspension of deportation as a matter of law."

PETITION DENIED.

APPENDIX B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Marcouiller, Barbara A., Esq.
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Office of the District Counsel/SE
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: SIMEONOV, TODOR KRUMOV A29-355-460

Date of this notice: 05/02/2002

Enclosed is copy of the Board's decision and order in the above-referenced case.

Sincerely,
Lori Scialabba
Acting Chairman

Enclosure
Panel Members:
HURWITZ, GERALD S.
OHLSON, KEVIN A.
OSUNA, JUAN P.

U.S. Department of Justice
Decsion of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A29 355 460 - Seattle
Date: May 02, 2002

In re: TODOR KRUMOV SIMEONOV

IN EXCUSION PROCEEDINGS

APPEAL

ON BEHALF OF THE APPLICANT: Barbara A. Marcouiller, Esquire

EXCLUDABLE: Sec. 212(a)(20), I&N Act [8 U.S.C. Section 1182(a)(20)] -
No valid immigrant visa

APPLICATION: Suspension of deportation

ORDER:

PER CURIAM. The applicant's appeal of an Immigration Judge's denial of his application of suspension of deportation as provided by the Nicaraguan and Central American Relief Act of 1997, Pub. L. No. 105-100, 111 Stat. 2193 ("NACARA"), is dismissed. Since the applicant is in exclusion proceedings, he is not statutorily eligible for suspension of deportation. *Matter of Torres*, 19 I&N Dec. 371, 372-73 (BIA 1986). Therefore, we shall not address the respondent's arguments that he established that he would

suffer extreme hardship if he were excluded and deported from the United States.

Accordingly, the appeal is dismissed.

FOR THE BOARD